DAMAGES IN WRONGFUL DEATH AND SURVIVAL ACTIONS

I. INTRODUCTION

The oft-cited case of *Baker v. Bolton*[1] forever established the common law rule that there could be no civil action for the death of a human being. The decision was no doubt prompted by the historical considerations that tort actions were only an adjunct to criminal law, and that, traditionally, the crown confiscated the property of any person committing homicide.[2] Consequently, nothing was left to compensate the estate or beneficiaries of the deceased, so a civil action would have been meaningless.[3] The exclusiveness of the action by the state if a felony had been committed was thus said to *merge* any tort action into the criminal judgment. In *Baker,* however, the merger doctrine of tort and criminal law was not appropriate, for the wrong of the defendant was only a misdemeanor and the state was excluded from executing on the propery.[4] Thus, Lord Ellenborough had occasion to pronounce a new doctrine of recovery. He conservatively, though perhaps illogically, chose to decline the opportunity and held simply that the death of a human being was not actionable in a civil court. It has been exceedingly convenient and soothing for the legal profession to criticize this manifestly unjust and irrational rule, having had fifteen decades of additional experience from which to summon arguments. Unfortunately, it has also been fashionable to do so rather than to direct attention to the morass which confronts any would-be litigant in a death action. This is not, however, because our present society must directly confront the common law rule. That convention was abandoned in 1846 with the passage of the first statute allowing a civil action for wrongful death: "Act for compensating the Families of Persons killed by Accidents."[5] Commonly referred to as Lord Campbell's Act, the statute has weathered progress and defied its proper role of serving only as a beginning. Most United States jurisdictions adopted its vague wording and have since added only piece-meal variations which offer little aid to

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1 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

2 W. PROSSER, TORTS § 120, at 920 (3rd ed. 1964).

3 Hay, *Death as a Civil Cause of Action in Massachusetts,* 7 HARV. L. REV. 170, 172 (1893).

4 *See* Smedley, *Wrongful Death—Bases of the Common Law Rules.* 13 VAND. L. REV. 605, 615 (1960.)

5 9 & 10 Vict. ch. 93 (1846).

the courts or to those who would attempt to divine the legislative intent. Some jurisdictions have added or substituted survival statutes which continue the cause of action the decedent would have had had he lived. Others combine their wrongful death and survival acts thereby offering any number of variations concerning the proper parties to the action, defenses and the distribution of damages. The results of this adherence to Lord Campbell's Act, the fragmented attempts at change and the beckoning doctrine of the *Baker* case combine to offer a stilted and many times irrational approach to the entire area. Legislatures have repeatedly written the various kinds of death acts in indefinite terms and thrust responsible implementation onto persuasive lawyers, hopefully progressive courts and confused juries. The results are understandably diverse. This article will attempt to digest only those doctrines representing either a substantial majority or minority, indicate definite trends and propose approaches which have either proved successful, or could so prove, in the prosecution of a death action.

II. Kinds of Statutes Distinguished

Lord Campbell's Act specifically designated "the Wife, Husband, Parent and Child"[6] as the beneficiaries of a death action. Because a civil action upon death was authorized exclusively by statute, none but designated beneficiaries or their representatives had any standing in court. Most United States jurisdictions have since expanded their laws to include or substitute a cause of action for the benefit of a decedent's estate, whether the injury in question was the cause of death or not. That is, a personal injury action will not lapse simply because the injured person dies from independent causes. His representative may prosecute *any* action the decedent had at death. It is theoretically important to distinguish between a survival action, which is for the benefit of a decedent's estate, and a wrongful death action, which is for the benefit of statutory beneficiaries. The former supposedly only continues the cause of action the decedent had at death, although the statutes often allow the jury to also award expenses and damages to the estate which have been caused by the death.[7] The wrongful death acts, however, create an entirely new cause of action brought into existence by the death itself. More importantly, they need to be separated because the kinds and measure of damages vary in important respects and because the statutes dictate to whom any recovery will flow.

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6 *Id.*

7 S. Speiser, Recovery for Wrongful Death § 14:2 (1966). [hereinafter cited as Speiser].

Most wrongful death statutes provide that damages are to be assessed in accordance with the loss designated beneficiaries have suffered by reason of the death.[8] The appropriate figure is arrived at by assessing the present value of the probable contributions the deceased would have made to the beneficiaries had he lived. The majority limit this recovery to pecuniary contributions[9] but include the value of services he might have rendered[10] such as moral and educational training.[11] That is, the contributions which the jury considers may be broader than simply the dollars which decedent gave to beneficiaries. If he rendered a service to them which can be measured by some standard, the jury may award the dollar worth of that lost service. A few jurisdictions have included the recovery of medical and funeral expenses[12] and any inheritance which would have passed to beneficiaries at normal life expectancy.[13] An allegedly smaller minority allow recovery for non-pecuniary losses such as anguish suffered by the beneficiaries and the lost companionship. That this limitation is often more illusory than real will be seen in subsequent sections.

The survival statutes usually provide that the personal representative of the deceased may recover for those injuries the decedent could have been compensated for had he lived.[14] This measure includes recoveries normally sought through the common tort actions such as pain and suffering, care and treatment, and loss of earnings from injury until time of death. In addition, the measure may include the losses the estate suffered measured by the present value

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8 *See, e.g.*, the wrongful death statutes of Colorado (COLO. REV. STAT. ANN. § 41-1-3 (1963)) and Maryland (MD. ANN. CODE art. 67, § 4 (1957)).

9 Michigan Cent. R.R. v. Vreeland, 227 U.S. 59 (1913), is one of the first notable wrongful death cases decided in the United States and fairly illustrates this view. It is also representative of the reasoning which has prevailed since Blake v. Midland Ry., 18 Q.B. 93, 118 Eng. Rep. 35 (1852), held that damages should be limited to pecuniary losses.

10 Wells, Inc. v. Shoemake, 64 Nev. 57, 177 P.2d 451 (1947).

11 Michigan Cent. R.R. v. Vreeland, 227 U.S. 59 (1913); Baltimore Transit Co. v. State, 194 Md. 421, 71 A.2d 442 (1950); Prauss v. Adamski, 195 Ore. 1, 244 P.2d 598 (1952).

12 *See, e.g.*, ALASKA STAT. § 13.20.340 (1962); GA. CODE ANN. § 105-1310 (1967); MICH. COMP. LAWS § 27A.2922 (1952); N.Y. DECED. EST. § 132 (1949); PA. STAT. ANN. tit. 12, § 1602 (1966).

13 O'Toole v. United States, 242 F.2d 308 (3rd Cir. 1957). This case will be discussed in later sections because it has served as a landmark since being reported. The able reasoning by Judge Goodrich has been cited many times in justifying the award of lost inheritance.

14 *See, e.g.*, ILL. REV. STAT., ch. 3, § 339 (Supp. 1966); OHIO REV. CODE ANN. § 2305.21 (Page Supp. 1966).

of the probable future earnings the decedent would have realized had he lived. This last statement would seem to conflict with the idea that the measure of the award should be based upon the injuries and damages the decedent had suffered by the time of his death. The explanation is that a number of jurisdictions statutorily added post-death considerations to the damages question, thereby forming a combination survival-death act. Thus these combinations are both true survival acts which simply substitute decedent's representative in the action and measure damages as if decedent were alive, and death acts which may include considerations of funeral expenses and future lost earnings. If the act is a survival-death type, probable future earnings are computed by either considering the total gross income decedent expected and deducting personal expenses, or by subtracting all expenses from his probable future gross income. The particular computations which are exercised will depend entirely upon the leanings of the particular jurisdiction involved.[15]

The variations on the two basic statutory themes of survival or death actions are seemingly endless. Some jurisdictions stipulate that if death was instantaneous, no action for the decedent arose, and only a wrongful death action is appropriate.[16] Some identify their acts as being in the wrongful death category but measure damages by a loss to the decedent's estate formula.[17] Some provide for a survival and wrongful death action by statute, but then demand that a party elect to proceed under only one.[18] Others allow both actions to be brought separately, while still others insist that they be consolidated. No guiding policy or social philosophy appears in these legislative spasms, and this article cannot be a substitute for a detailed study of the particular jurisdiction's laws and its court's interpretations of them.

Whether to pursue a survival action or wrongful death suit, or both, to judgment is largely determined initially by statute. Thus if an attorney discovers that he is limited to one action, or that a judgment in one bars pursuance of the other, he must immediately counsel the best choice. The subtle considerations of this decision will be left to a more expansive treatise: *e.g.*, a survival action may beckon because of its promise of a large recovery for pain and suffering, but the jury may not respond to compensating the lifeless, legally created entity of an estate; or even if it does respond, there

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15 This measuring process will be explained in detail in subsequent sections.

16 *E.g.*, Beaven v. Seaboard Air Line R.R., 100 F. Supp. 336 (N.D. Fla. 1951).

17 *E.g.*, R.I. GEN. LAWS ANN. § 10-7-1 (1956).

18 C. & O. Ry. v. Bank's Adm'r, 142 Ky. 746, 135 S.W. 285 (1911).

may be creditors of the estate waiting to attach the recovery before the family realizes any benefit. A more concrete consideration is how a particular defense will affect the decision. Except where changed by statute,[19] the universal rule is that contributory negligence of the decedent will bar both survival and wrongful death actions.[20] This limitation stems from Lord Campbell's Act which stated that the beneficiaries had an action only if the decedent could have maintained one had he lived.[21] However, the contributory negligence of a beneficiary normally will not affect a survival action,[22] while it may decrease or even eliminate recovery under a wrongful death statute.[23] Most jurisdictions similarly hold that a prior judgment for or against the decedent for his fatal injuries will bar a survival or wrongful death action.[24] Many jurisdictions apply the same result when the decedent has previously settled or compromised his action.[25] A growing minority, however, logically reason that the death action could not have arisen prior to decedent's demise, by statutory definition, that it is a new injury in question, and that no previous judgment or compromise could defeat it even before its birth.[26]

The effects of other distinguishing features of the statutes will be discussed in subsequent sections if they concern damage considerations.

III. Survival Actions

A. *Aspects of Survival Actions*

The original English death act left sizeable questions and gaps concerning the status of an injury action upon the death of one of

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19 Mississippi and Wisconsin have, for example, passed comparative negligence statutes. Miss. Code Ann. § 1454 (Supp. 1966); Wis. Stat. Ann. § 331.45 (1966).

20 *See, e.g.*, Davis v. Quality Oil Co., 353 S.W.2d 670 (Mo. 1962); Seyfer v. County of Otoe, 66 Neb. 566, 92 N.W. 756 (1902). The *Davis* case was a wrongful death action, the *Seyfer* case a survival action.

21 Lord Campbell himself initiated this rule shortly after enactment of the Death Act; Senior v. Ward, 1 El. & El. 385, 120 Eng. Rep. 954 (1859).

22 Burns v. Goldberg, 210 F.2d 646 (3rd Cir. 1954), interpreting the Pennsylvania survival act.

23 *See* Speiser, §§ 5:5-5:8 for a complete discussion.

24 Schlavick v. Manhattan Brewing Co., 103 F. Supp. 744 (N.D. Ill. 1952), interpreting Indiana law.

25 Libera v. Whittaker, Clark & Daniels, Inc., 20 N.J. Super. 292, 89 A.2d 734 (1952).

26 Brown v. Moore, 247 F.2d 711 (3rd Cir. 1957); Earley v. Pacific Electric Ry., 176 Cal. 79, 167 P. 513 (1917).

the parties.[27] There was no provision for maintaining or continuing an action if an injured party died from causes unrelated to the action being prosecuted. Furthermore, if the injured party died leaving no statutory beneficiaries, an action by and for his estate similarly withered.[28] Most jurisdictions have since promulgated one of the types of survival acts previously mentioned which allows the personal representative of the deceased to prosecute to judgment any action the decedent might have maintained during his life. The majority of the states with survival statutes do not distinguish between actions for fatal and non-fatal injuries; that is, their statutes are broad enough to allow the decedent's representative to prosecute any action the decedent might have maintained. As might be anticipated, however, some jurisdictions do differentiate between actions or add variations.[29]

Basically a true survival statute merely continues the action the decedent might have maintained at his death. A survival-death statute includes decedent's action, but expands the possible recovery by allowing the jury to consider injuries to his estate that have arisen by reason of death.[30] Because it is the injury to decedent, and perhaps his estate, which is at issue, the measure of damages should be fashioned without reference to the needs and expectations of a family or beneficiaries. Compensation for the injuries might thus include damages for decedent's pain and suffering,[31] his medical ex-

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27 The original English act did not provide for maintaining a cause of action if the tortfeasor died. Today most jurisdictions provide by statute or court decision that an action may be maintained if the tortfeasor died after the death of the injured party. *E.g.*, CAL. CIV. PROCEDURE CODE § 385 (West 1954), OHIO REV. CODE ANN. § 2125.01 (Page 1954). *See also* Apitz v. Dames, 205 Ore. 242, 287 P.2d 585 (1955). Some jurisdictions reach a similar result if the tortfeasor dies before or simultaneously with the injured party. CAL. CIV. PROCEDURE CODE § 385 (West 1954); Harrison v. Weisbrod, 358 S.W.2d 277 (Mo. App. 1962)

28 It is impossible to construe the original English act as a survival act. Although the first section of the statute is apparently broad enough to include such an action, paragraph two limits the coverage to certain family members without whose existence the action cannot be maintained.

29 Missouri Pac. R.R. v. Creekmore, 193 Ark. 722, 102 S.W.2d 553 (1937), held that there could be no action when death was instantaneous. *See also* VT. STAT. ANN. tit. 14, § 1453 (1958) which states that there may be no action unless it was pending at the time of death of either party. IND. ANN. STAT. 2-403 (Burns 1967) is an example of a statute which apparently provides for a survival action only if it is to prosecute for non-fatal injuries.

30 *See, e.g.*, CONN. GEN. STAT. ANN. §§ 45-280 and 52-555 (West 1958).

31 Coulson v. Shirks Motor Express Corp., 48 Del. 561, 107 A.2d 922 (1954); Campbell v. Romanos, 346 Mass. 361, 191 N.E.2d 764 (1963), Skoda v. West Penn Power Co., 411 Pa. 323, 191 A.2d 822 (1963)

penses[32] and those earnings lost from the time of injury until death.[33] If it is an expanded survival act (survival-death), funeral expenses[34] and probable *future* earnings will also be considered.

The loss of earnings element in a survival-death act requires further clarification because there are three situations in which the problem will arise. First, if the action revived is not for the injury which caused death, the jury may award loss of earnings only until death actually occurred from the independent cause. The jury, of course, cannot be allowed to speculate about probable life expectancy when a definite moment in time has been established by the death. Second, if the injury did cause death, the revived survival-death action should conceptually include a consideration of loss of earnings based on life expectancy prior to the injury. As can be seen, the argument that life expectancy has in fact been established by death is not appropriate here and begs the question. It is the injury in question which has shortened the anticipated life expectancy, and it is the task of the jury to determine future earnings based on previous life expectancy. Indeed, this is the result reached in those states which have substituted a survival-death action as the exclusive remedy upon death. Such states have abolished Lord Campbell-type acts in favor of the combination survival-death acts.[35] The measure of damages is generally ascertained by considering the loss the estate has suffered, even though the act may provide for distribution of the proceeds to statutory beneficiaries.[36] Louisiana and Maine, however, measure damages by looking to the losses the beneficiaries have suffered even though their statutes are otherwise in the form of a survival-death act.[37]

The third situation arises when the injury has caused the decedent's death and the jurisdiction has *both* a survival-death and a wrongful death act, and allows them to be prosecuted concurrently. If each could be pursued to judgment without reference to the other, a duplication of damages would result, thereby penalizing the defendant by awarding damages in excess of actual injury.[38]

32 Coulson v. Shirks Motor Express Corp., 48 Del. 561, 107 A.2d 922 (1954); Skoda v. West Penn Power Co., 411 Pa. 323, 191 A.2d 822 (1963). *See also* authorities cited *supra* note 12.

33 *Id.*, *See also* Allen v. Burdette, 66 Ohio App. 236, 32 N.E.2d 852 (1940).

34 *See supra* note 12.

35 CONN. GEN. STATS. ANN. § 45-280 (West 1958); N.H. REV. STATS. § 556-12 (1967); Butler v. Steck, 146 Conn. 114, 148 A.2d 246 (1959).

36 *See* N.H. REV. STATS. § 556-14 (1967).

37 *See* LA. STATS. ANN. art. 2315; ME. REV. STAT. tit. 18, § 2501 (1964).

38 For a complete analysis of the double recovery problem, *see* Schumacher, *Rights of Action under Death and Survival Statutes*, 233 MICH. L. REV. 114 (1924); Note, 44 HARV. L. REV. 980 (1931).

For example, many jurisdictions provide that loss of earnings under a survival-death statute are measured by aggregating the gross earnings decedent expected and subtracting what would have been his personal expenses had he lived. The result is his net earnings. Obviously, if a wrongful death action were subsequently prosecuted the measure of anticipated contributions from the decedent to survivors, a normal measurement under a wrongful death act, would include a substantial portion of what had already been collected through a survival-death action as the net earnings of decedent. To avoid this duplication, the states judicially provide that loss of earnings may be considered only until the date of death under a survival-death action.[39] The effect of this judicial manipulation is to alter survival-death acts so that they become true survival acts for purposes of deciding a particular case. All damages which arose prior to decedent's death are awarded to the estate, but both the measure and distribution of damages sustained by reason of death itself go to the beneficiaries designated by the jurisdiction's wrongful death act. This arbitrary assignment of date of death as the point in time at which damages are split between the estate and survivors necessarily affects someone's interests. The victims in this instance are supposedly the creditors of the estate, who are usually precluded from sharing directly in damages which flow to survivors.[40] This, however, assumes that beneficiaries of the decedent are not liable to decedent's creditors. Since the principal beneficiary is most often the surviving spouse, it is questionable whether creditors are in fact inequitably treated. That is to say, debts of large amounts are usually debts of both spouses, and the death of one still leaves the survivor liable. Thus, even though the creditors are prohibited from sharing proceeds with beneficiaries *directly,* it is often likely that they will realize what is owed to them through the surviving spouse.

B. *Measuring Damages Under Survival Acts*

In computing damages in either a wrongful death or survival action, the phrase "reduced to present worth" will often appear. This is simply a recognition that the lump sum awarded to a beneficiary or an estate is worth more than if it had come in piece-meal during future years. The sum can be invested by the claimants and that portion of the principal representing future earnings will return

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39 Duffey, *The Maldistribution of Damages in Wrongful Death,* 19 Ohio St. L.J. 264, 268 (1958).

40 *See, e.g.,* D.C. Code § 16-2703 (1967).

interest until it is consumed. This interest, of course, is income which would not have been realized if decedent had lived to contribute annual earnings which would have been used immediately by the beneficiaries. The court must therefore instruct the jury that the sum awarded is to be based upon that combination of principal *and interest* which would equal decedent's probable future contributions.[41] In this way the tortfeasor receives a credit for the investment returns so that the amount he is obligated to pay will equal the losses suffered and no more. The mechanics of discounting by use of a chosen percentage for a period equal to decedent's life expectancy may be further explored by referring to the article cited.[42]

1. Loss of Earnings

If the survival action includes damages which arise by reason of death, a great part of any recovery will be for extinguished earning capacity of the decedent. Three theories have been developed for measuring this loss:

> (1) The probable worth of decedent's future *net earnings* had he lived to his normal life expectancy. To attain this figure, what would have been his personal expenses are deducted from his probable gross earnings.
> (2) The present worth of decedent's probable future *savings* had he lived to normal life expectancy. Probable personal expenses and family expenditures are both subtracted from probable gross earnings.
> (3) The present worth of decedent's future *gross* earnings. No expenses are deducted from the award computed.

The last cited formula, total gross earnings, has one great attribute: it is simple. But it is also an unintelligent approach and is seldom used.[43] There is little justification for demanding that a defendant pay for personal expenses that a decedent will never realize. The result of this approach is to award a combination punitive-compensatory recovery which is in fact neither, since it only partially levies exemplary damages by assessing costs which will not materialize, while otherwise purporting to measure probable earnings.

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41 The jury usually has mathematical tables to assist them in these computations. *See* SPEISER, § 8:5 for examples of such aids.

42 Leasure, *How to Prove Reduction to Present Worth,* 21 OHIO ST. L.J. 204 (1960).

43 For examples of application of this formula, *see* Michael v. Western & Atl. R.R., 175 Ga. 1, 165 S.E. 37 (1932); Lexington Utilities Co. v. Parker's Adm'r. 166 Ky. 81, 178 S.W. 1173 (1915).

The second formula, anticipated savings, presents the most theoretically accurate method for measuring loss of earnings.[44] Every expenditure decedent might have had during his life is deducted from expected gross earnings. The remainder is awarded to the estate as damages. Recalling that the theory of a survival-death action, as pertains to future earnings, is to compensate the estate without reference to any beneficiaries, this formula most nearly approximates the bounty which would have flowed by will or intestacy from decedent at the termination of a normal life expectancy. The theory is often attacked, however, because it neglects to consider the dependents of decedent who have lost their means of support.[45] In other words, its critics implore the courts to deliver from blunder those legislatures which have failed to provide otherwise for the expectations of beneficiaries. This situation arises, of course, when the legislature has stipulated that survival-death actions are the exclusive means of litigating a death action. The ambition of the critics is both noble and worthwhile, but one should be hesitant to so manipulate apparent legislative desires. If a legislature wanted a wrongful death act to compensate beneficiaries for their losses, it would presumably have acted accordingly. Renovation of disliked legislation by way of boldly inaccurate administration is seldom a successful way to accomplish needed change.

The most popular way to measure loss of earnings under a survival act, and the one favored by critics of the second method, is the first theory, the present worth of decedent's probable future net earnings. The formula deducts from gross earnings only what would have been decedent's personal expenses and disregards probable expenditures for dependents. The remainder is awarded as damages to the estate.[46] The courts which use this formula reason that it is appropriate because, after deducting personal expenses, the amount left is presumably what decedent would have expended on his beneficiaries and dependents or left to them at his death. The adherents to this method also argue that it is proper to use because it is similar to the recovery which would be realized under a wrongful death action and recognizes the needs of dependents.[47] The approach, however, only partially reflects a normal wrongful death recovery.

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44 For examples of application of the second formula, *see* Lampe v. Lagomarcino-Grupe Co., 251 Iowa 204, 100 N.W.2d 1 (1959); Fla. E. Coast Ry. Co. v. Hayes, 67 Fla. 101, 64 So. 504 (1914).

45 2 F. HARPER & F. JAMES, TORTS, § 25.15 (1956); SPEISER, § 3:53, at 250.

46 Gonyer v. Russell, 160 F. Supp. 537 (D. R.I. 1958); Bryant v. Woodlief, 252 N.C. 488, 114 S.E.2d 241 (1960).

47 2 F. HARPER & F. JAMES, TORTS, § 25.15 (1956); Speiser, § 3:53, at 250.

There is no way to include compensation for the loss of services to dependents, or award damages for non-pecuniary losses such as the value of decedent's companionship. Thus, the theory cannot be a substitute for a wrongful death action, and any operation which is to attempt precise recognition of the losses that family members suffer must still be accomplished by the legislature.

2. Funeral Expenses

Many jurisdictions provide by statute that funeral expenses are recoverable in a survival-death action in that this cost is usually a debt of the estate.[48] Courts often reach the same result without legislative encouragement.[49] There is, however, contrary authority which reasons that the estate would have been burdened ultimately with the expense at any rate, so that it is not fair to levy this charge on the tortfeasor.[50] Using this approach, the only cost to the defendant should be the small amount the estate has lost by having to pay the expense prematurely, *i.e.*, it is the "reduced to present worth" theory in reverse. Obviously a defendant might argue that the premature payment loss should be offset in his favor by considering evidence on inflationary trends. It is not common to discover this kind of bickering, however, simply because of the comparatively insignificant amount involved.

3. Medical Expenses

Survival acts usually provide that medical expenses incurred by decedent are recoverable. The measure used will be the same as that applied to non-death cases in the jurisdiction.

4. Pain and Suffering

Most states provide that the estate may recover for the pain and suffering which the decedent endured.[51] The theory is logically correct because the action is merely a continuation of decedent's rights. However, some jurisdictions have seemingly recognized that damages for pain and suffering probably exist to provide a balm for one who has experienced agony and lived to remember it. They therefore

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48 *See, e.g.*, MD. ANN. CODE art. 93, § 112 (1957).

49 Baker v. Salvation Army, 91 N.H. 1, 12 A.2d 514 (1940).

50 Brady v. Haw, 187 Iowa 501, 174 N.W. 331 (1919).

51 Coulson v. Shirks Motor Express Corp., 48 Del. 561, 107 A.2d 922 (1954); Campbell v. Romanos, 346 Mass. 361, 191 N.E.2d 764 (1963); Fielder v. Ohio Edison Co., 158 Ohio St. 375, 109 N.E.2d 855 (1952); Skoda v. West Penn Power Co., 411 Pa. 323, 191 A.2d 822 (1963). *See also* ME. REV. STAT. ANN. tit. 18 § 2553 (1964) which specifically allows pain and suffering damages.

disallow pain and suffering compensation in a survival action[52] because the torment of decedent is gone with his death, and it requires too fabricated a justification to vindicate the recovery as a loss suffered by the estate. Pain and suffering damages will nevertheless continue to be awarded in most jurisdictions because they are conceptually acceptable; they are probably enmeshed with thoughts of punishing the defendant, and perhaps allow the jury to express its regard for the anguish of relatives.

IV. Wrongful Death Actions

Wrongful death statutes patterned after Lord Campbell's Act have been adopted in most states. They are primarily designed to compensate designated beneficiaries who have lost their means of support by the premature death of a person who has theretofore provided their principal income. However, the legislatures and courts also recognize and attempt to compensate for other pecuniary injuries beneficiaries have suffered, as when death strikes a wife or child who did not contribute direct financial support.

The previously mentioned adherence to Lord Campbell's Act by United States legislatures has perpetuated several problems. The English act simply allowed the jury to award damages proportionate to the injury.[53] American legislatures provide equally vague instructions, suggesting that the liability to tortfeasors and the award to the beneficiaries be "fair and just"[54] "proportionate to the injury"[55] or "under all the circumstances may be just."[56] Juries are thus empowered with great discretion as to what they consider to be a fair award, although they must act under the scrutiny of trial court and appellate review, and occasionally within minimum and maximum limits determined by the legislature.[57] Further control of the juries is often imposed by the courts and legislatures which state that only the pecuniary losses which beneficiaries have suffered may be considered. For example, the jury is always empowered to compute the value of decedent's services, even though these kinds of contributions are received in a form other than money. The value of serv-

52 Indiana (Ind. Ann. Stat. § 2-403 (Burns 1967)) excludes these damages by specifying the only damages which may be awarded. Ariz. Rev. Stat. Ann. § 14-477 (1956) and Cal. Civ. Procedure Code § 573 (West 1954) specifically exclude pain and suffering.

53 "[T]he Jury may give such Damages as they may think proportioned to the Injury resulting from such Death . . . ."

54 Minn. Stat. § 573.02 (1965).

55 Tex. Rev. Civ. Stat. Ann. art. 4677 (1952).

56 Utah Code Ann. 78-11-7 (1953).

57 Thirteen states provide maximums: *See* Speiser, § 7:2.

ices can be measured by looking at the cost of substitute services or the market value of a particular task decedent regularly performed. However, the jury is often precluded from awarding damages for the lost companionship of decedent or the anguish the beneficiaries have suffered, because there is no accurate way in which to measure these losses. It is said that they are "non-pecuniary" in nature and beyond valuation. This restriction on non-pecuniary losses, too, sifted down to the present directly from the original English death act. *Blake v. Midland*,[58] decided shortly after the Act was promulgated, interpreted the general language of the statute as including only pecuniary losses. Most United States jurisdictions adopted that ruling in their courts and legislatures.[59] However, as indicated above, the states are in unanimous agreement that the pecuniary value of lost services such as training and moral guidance[60] which decedent might have rendered is included.[61] Some jurisdictions even permit the jury to judge and award the pecuniary worth of such items as the value of decedent's society, companionship and attention.[62] Other jurisdictions have gone even farther and have completely rejected the pecuniary loss rule in allowing awards for the mental anguish and suffering of the beneficiaries.[63]

A. *Measuring Damages Under Wrongful Death Acts*

1. Financial Contributions

Contributions for support and maintenance that decedent might have been expected to give to beneficiaries will often form a substantial portion of a wrongful death award. This will be especially true if the decedent was the family wage earner or if the jurisdiction has adopted a strict "pecuniary damages only" attitude.

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58 18 Q.B. 93, 118 Eng. Rep. 35 (1852).

59 Michigan Cent. R.R. v. Vreeland, 227 U.S. 59 (1913); Gulf, Colo. & S. F. R.R. v. Farmer, 102 Tex. 235, 115 S.W. 260 (1909). *See also* ARK. STAT. ANN. § 27-909 (1963); ILL. REV. STAT. ch. 70, § 2 (1963); OHIO REV. CODE ANN. § 2125.02 (Page 1953).

60 *See, e.g.*, Vines v. Arkansas Power & Light Co., 232 Ark. 173, 337 S.W.2d 722 (1960); Alden v. Norwood Arena, Inc., 332 Mass. 267, 124 N.E.2d 505 (1955).

61 Norfolk & W. Ry. v. Holbrook, 235 U.S. 625 (1915); Rogow v. U.S. 173 F. Supp. 547 (S.D.N.Y. 1959).

62 Bower v. Brannon, 141 W.Va. 435, 90 S.E.2d 342 (1955). *See also* the leading case of Wycko v. Gnootke, 361 Mich. 331, 105 N.W.2d 118 (1960), although the case is more notable for expressing the "lost investment" theory.

63 Statutes: ARK. STAT. ANN. § 27-909 (1963); FLA. STAT. § 768.03 (1965); KAN. GEN. STAT. ANN. § 60-1904 (1964). *See also* Matthews v. Hicks, 197 Va. 112, 87 S.E.2d 629 (1955); Kelley v. Ohio River R.R., 58 W.Va. 216, 52 S.E. 520 (1905).

Two methods are used to calculate lost support payments to survivors:

> (1) Decedent's probable future personal expenses are deducted from his probable future gross income and the remainder is reduced to present worth and awarded as lost contributions.[64]
> (2) Actual contributions of the decedent are calculated and aggregated based on life expectancy.

The first method is applied more often but can be criticized if the court fails to consider that a portion of what decedent contributed to his dependents was returned to him in kind.[65] He probably consumed part of the food in the home, shared the family dwelling and automobile, and otherwise benefited from family expenditures. However, a simple mathematical approach will not correct the deficiency. For example, a family consisting of only a husband and wife may have shared an expensive apartment, but it would be unfair to the survivor to hold the tortfeasor liable for only half of the future rent. The survivor should not have to move to a smaller apartment or find a tenant to share the costs of the living quarters. One purpose of a wrongful death award should be to insure that the survivor is able to maintain the standard of living to which he or she has been accustomed. Whether the courts consider these problems of joint and apportionable expenses is not often ascertainable from the reports. However, it may be conjectured that the courts which use the first method will approve an award by the jury where only those expenses which were obviously personal and individual have been deducted.[66] There are several reasons why this simplistic approach is not often successfully challenged: (1) The jury may have a difficult task even determining what are purportedly obvious personal expenses (*e.g.*, decedent made regular purchases of tools which he used in home repairs, but woodworking was also his hobby). (2) It allows the jury to at least reflect and continue the survivor's current standard of living. (3) It precludes intolerable delay which might be caused if there was an insistence on exact mathematical calculations. That is, the demands of crowded court dockets prevail at some point over the desire for exactness.

The second method is used when decedent has been contribut-

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64 O'Connor v. United States, 269 F.2d 578 (2d Cir. 1959), interpreting Oklahoma law. Note that this formula was seen in the discussion concerning survival acts as the preferred way to measure losses to the estate.

65 *Id. See also* the criticisms in Dowell Inc. v. Jowers, 166 F.2d 214 (5th Cir. 1948).

66 Wawryszyn v. Illinois Cent. R.R., 10 Ill. App. 2d 394, 135 N.E.2d 154 (1956).

ing easily ascertainable sums to certain beneficiaries.[67] Once the appropriate figure is determined, the only remaining task is to decide whether and for how long the payments would have continued if decedent had lived. This entails a consideration of the donee's life expectancy and of the decedent's life expectancy prior to the injury which caused death.[68] At a maximum, the award should reflect a continuation of payments only for the shorter of the life expectancies of donor and donee.[69] The anticipated period for which donations might have continued may also be shortened by other evidence which indicates that decedent would have stopped future payments.

Use of method two is also popular when the court is asked to determine the probable contributions of a wealthy decedent. Business expenses may become so entangled with personal expenses that practical separation becomes impossible. Moreover, experience should suggest that even after deducting his expenses, a decedent earning large amounts of money does not use all of the remainder to support his family. Substantial amounts may be invested while fairly constant amounts are contributed directly to the family. The objective of the approach is still to determine probable contributions, but the focus turns more to the past standard of living of the beneficiaries in an attempt to reach an accurate result.[70] As will be discussed in a later section, the survivors may still realize the benefits of decedent's probable future investments and savings by claiming from the defendant what would have been their inheritance at decedent's normal life expectancy.

2. Loss of Services

The death of a family member denies to the survivors some services which the decedent had previously performed, and many of them are measureable in terms of pecuniary value. The task of measuring the loss is often more complicated than calculating lost support payments, for there is no basic dollar figure from which to begin. Nevertheless, abundant aids are available to litigants from which reasonable estimates can be gathered to measure the value of the more common services rendered to family members.[71]

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67 Circle Line Sightseeing Yachts, Inc. v. Storbeck, 325 F.2d 338 (2d Cir. 1963).

68 Renaldi v. New York, N.H.&H. R.R., 230 F.2d 841 (2d Cir. 1956).

69 Baltimore Transit Co. v. State *ex rel.* Castranda, 194 Md. 421, 71 A.2d 442 (1950).

70 O'Toole v. United States, 242 F.2d 308 (3d Cir. 1957).

71 *See, e.g.*, Page, *'Pecuniary' Damages for Wrongful Death*, in TRIAL LAWYER'S GUIDE: 1963 ANNUAL 398 (J. Kennelly & J. Chapman ed.); Kierr, *Proof of Damages Arising from the Death of a Housewife*, 8 LA. BAR. J. 215 (1961). The many cases reported also provide guides for estimating these losses. *See, e.g.*, Smith v. Whidden, 87

More thorough consideration of specific services will be dealt with in sections following. However, consideration is most often given to the value of services performed by a child,[72] by a wife as mother and housewife,[73] and by a father or mother as the primary source of education and guidance to children.[74]

The cost of the replacement of the service is the criterion used to measure the damages,[75] and the amount is often quite substantial: 40,000 dollars to two children for the loss of their father's services;[76] 98,838 dollars for the lost services of a wife-mother not including 25,000 dollars to the husband for loss of consortium;[77] 46,059 dollars to the family for loss of a wife-mother.[78]

3. Loss of Companionship

A majority of United States jurisdictions decline to consider injuries to beneficiaries which are not measureable in terms of dollar losses.[79] The companionship, affection and consortium which a decedent might have bestowed on survivors are usually considered to be in this category of immeasureable losses. Paradoxically, these same jurisdictions which deny companionship and consortium losses in wrongful death actions display no hesitancy in awarding pain and suffering damages to an estate in a survival action,[80] and are equally cooperative in allowing damages for loss of consortium in a tort injury action.[81] The explanation generally set forth for denying dam-

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So.2d 42 (Fla. 1956); Alden v. Norwood Arena, Inc., 332 Mass. 267, 124 N.E.2d 505 (1955); Pennell v. Baltimore & O. R.R., 13 Ill. App. 2d 433, 142 N.E.2d 497 (1957).

72 da Silva v. J.M. Martinac Shipbuilding Corp., 153 Cal. App. 2d 397, 314 P.2d 598 (1957); Gluckauf v. Pine Lake Beach Club, Inc., 78 N.J. Super. 8, 187 A.2d 357 (1963).

73 Spangler v. Helm's N.Y.-Pitts. Motor Express, 396 Pa. 482, 153 A.2d 490 (1959).

74 Rogow v. United States, 173 F. Supp. 547 (S.D.N.Y. 1959); Kramer v. Portland-Seattle Auto Freight, Inc., 43 Wash. 2d 386, 261 P.2d 692 (1953).

75 Spangenberg, *Proof of Damages for Wrongful Death*, § 3.6 in WRONGFUL DEATH AND SURVIVORSHIP, (Beall ed. 1958).

76 Rogow v. United States, 173 F. Supp. 547 (S.D.N.Y. 1959).

77 Legare v. United States, 195 F. Supp. 557 (S.D. Fla. 1961).

78 Spangler v. Helm's N.Y.-Pitts. Motor Express, 396 Pa. 482, 153 A.2d 490 (1959).

79 *See* Byrne v. Matczak, 254 F.2d 525 (3d Cir. 1958), which reviews the thinking supporting this idea. *See also* MINN. STAT. § 573.02 (1965); OHIO REV. CODE ANN. § 2125.02 (Page 1953).

80 *See* authorities cited note 51 *supra*.

81 An excellent example of this confusion may be seen in Georgia which allows consortium loss only until death, but found such a loss where decedent lived for only 2 hours after the initial injury. Walden v. Coleman, 105 Ga. App. 242, 124 S.E.2d 313 (1962).

ages for loss of society and companionship in wrongful death actions is that the injuries are incapable of measurement, and that the jury might allow their sympathetic feelings for survivors to guide them.[82] There may be merit to these arguments, but they are no less applicable to the pain and suffering and consortium awards mentioned above. A better explanation might be that the jury has been given a broad measure of discretion by statute, yet the courts and legislatures believe that this freedom must be tempered, for proof of this kind of injury is difficult to present without arousing passions, and the enormity of loss by death would tax even the wise man who might be asked to value the worth of a friend and companion.

Some jurisdictions which are ostensibly guided by the pecuniary loss rule nevertheless manage to discover such value in the companionship or affection which decedent bestowed on survivors.[83] Perhaps one does not buy companionship and affection so that the reasoning of these courts is technically unimpeachable. But if it is determined that the loss of society is injurious and, though intangible, not fanciful, logic similarly might direct that replacement be attempted by way of financial awards. A growing number of states candidly recognize that the loss of companionship is not strictly a pecuniary damage, yet compensate for the injury nevertheless with the only thing available—financial awards.[84]

4. Anguish of Survivors

Only a few jurisdictions attempt to compensate for the pain and sorrow the beneficiaries have suffered by reason of the decedent's death.[85] Even those jurisdictions which are prone to recognize the injury suffered by loss of companionship, and which struggle to reason that it is a pecuniary injury, balk at compensating for the grief of survivors. One commentator reasons that "the distinction between the pain of a broken arm and the pain of a broken heart is judge-made . . ."[86] but it is a distinction which almost all of the

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82 O'Connor v. United States, 269 F.2d 578 (2d Cir. 1959) (interpreting Oklahoma law); Byrne v. Matczak, 254 F.2d 525 (3d Cir. 1958).

83 Wycko v. Gnootke, 361 Mich. 331, 105 N.W.2d 118 (1960); Fussner v. Andert, 261 Minn. 347, 113 N.W.2d 355 (1961); Spangler v. Helm's N.Y.-Pitts. Express, 396 Pa. 482, 153 A.2d 490 (1959).

84 Gulf Transport Co. v. Allen, 209 Miss. 206, 46 So. 2d 436 (1950); Basham v. Terry, 199 Va. 817, 102 S.E.2d 285 (1958); Gustafson v. Bertschinger, 12 Wisc. 2d 630, 108 N.W.2d 273 (1961).

85 Graham v. Western Union Tel. Co., 109 La. 1070, 34 So. 91 (1903); Matthews v. Hicks, 197 Va. 112, 87 S.E.2d 629 (1955).

86 Spangenberg, *supra* note 75 § 3.2, at 65.

states have chosen to uphold.[87] The reality of wounded feelings is probably as susceptible to measurement as vanished companionship, but it is not an item traditionally considered in court actions of any kind. The criticisms that might be leveled at the attempts to compensate for loss of companionship, however, are also appropriate in this area of anguish of survivors. There is probably a logical difference in that companionship focuses on the dissolved relationship while considerations of anguish concentrate on the bereaved survivor's singular suffering. Yet the difference for the purposes of measuring damages is rather artificial. Nevertheless, the majority rule abides with unwavering vigor, and it can be anticipated that it will remain firm even while these jurisdictions move steadily toward compensating for loss of companionship.

5. Medical Expenses

The states appear to be almost evenly split concerning the question of whether beneficiaries should recover the medical expenses which decedent incurred. Perhaps a slight majority hold that they are not recoverable because they are not an expense which has arisen by reason of decedent's death.[88] The wording of many statutes would seem to dictate this result in that they generally limit damages to those "injuries resulting from such death."[89] However, some statutes specifically allow the recovery of medical expenses[90] and other state courts approve this kind of award, especially if the statutory beneficiary is liable for payment of the medical bills.[91]

6. Funeral Expenses

In the discussion of survival acts, it was noted that there is disagreement concerning the charging of funeral costs to a wrongdoer. The same arguments are equally applicable in discussing wrongful death cases, and there is a similar split of authority as to whether they should be awarded as damages. A few states deny recovery for burial costs,[92] but the majority holds that they are a direct result of the tortfeasor's act and are recoverable from him.[93]

87 *See, e.g.*, Mieske v. Public Utility Dist., 42 Wash. 2d 871, 259 P.2d 647 (1953); O'Connor v. United States, 269 F.2d 578 (2d Cir. 1959).

88 Gallup v. Sparks-Mundo Engineering Co., 43 Cal. 2d 1, 271 P.2d 34 (1954).

89 ILL. REV. STAT. ch. 70, § 2 (1959).

90 *See, e.g.*, GA. CODE ANN. § 105-1310 (1956).

91 Langford v. Ritz Taxicab Co., 172 Neb. 153, 109 N.W.2d 120 (1961); Orcult v. Spokane County, 58 Wash. 2d 846, 364 P.2d 1102 (1961).

92 Consolidated Traction Co. v. Hone, 60 N.J.L. 444, 38 A. 759 (1897).

93 Legare v. United States, 195 F. Supp. 557 (S.D. Fla. 1961); Shield v. County of Buffalo, 161 Neb. 34, 71 N.W.2d 701 (1955). *See also* CONN. GEN. STATS. § 45-280 (1958); WISC. STAT. ANN. § 331.04 (1958). *See also* Luis v. Cavin, 88 Cal. App. 2d 107, 198 P.2d 563 (1948).

7. Inheritance

If adequate proof is offered to demonstrate that decedent would have accumulated some wealth at normal life expectancy, and if the evidence can also show that the estate would have passed to the statutory beneficiaries either by will or intestacy, most jurisdictions allow the jury to award damages representing the amount. Some older cases are reported which deny the recovery of possible inheritance, but a close inspection of the court's reasoning indicates that the inadequacy of proof is what prompted them to refuse the award.[94] The beneficiaries forfeited nothing anyhow, if the jurisdiction calculated loss of contributions by using the net earnings theory. That is, if a court directed that lost contributions be calculated by taking decedent's expected gross income, deducting his probable personal expenses and awarding the remainder, nothing would be left from which to accumulate savings from which an inheritance could flow. By definition, the net earnings theory directs that all funds which would have remained after decedent's personal expenses should be awarded to his family. Therefore, if the decedent had only an average income, the final award to beneficiaries equals the same amount whether the total is derived by adding possible inheritance to actual contributions or lumping the amount as probable net earnings. Nevertheless, the method is haphazard and should not be fostered, especially if the decedent was wealthy and could have been expected to accumulate some savings after deducting family and personal expenses.[95]

O'Toole v. United States[96] presents a graphic, well reasoned discussion of loss of inheritance damages. The court there recognized that consideration of possible inheritance is speculative, but also noted that it is no more so than other considerations which make up major portions of death damages.[97] The decision is perhaps most cited because the court of appeals remanded the case to the trial court for consideration of loss of inheritance damages, even though there had already been an award of 470,000 dollars to the widow. The decision thereby makes severe incursions into the idea propounded by some courts and legislatures that death awards

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94 Mobile & O. R.R. v. Williams, 219 Ala. 238, 121 So. 722 (1929); Baker v. Slack, 319 Mich. 703, 30 N.W.2d 403 (1948).

95 *See* Wawryszyn v. Illinois Cent. R.R., 10 Ill. App. 2d 394, 135 N.E.2d 154 (1956), where probable expenses were deducted from anticipated gross income and there was therefore nothing to accumulate.

96 242 F.2d 308 (3rd Cir. 1957).

97 *Id.* at 312.

should be limited; evidence notwithstanding, a very high award is probably excessive.[98] Later federal decisions have followed *O'Toole* in holding that loss of probable inheritance is a proper element of damages in wrongful death actions.[99] Some state courts which had been reluctant to award lost inheritance, or shy to approve high awards, will hopefully be influenced by the reasoning of these federal decisions.

B. *Death of Husband and Father (Head of Family)*

This portion of the discussion will focus on the typical situation where the wage earner and head of the family is a man. Numerous cases arise, however, where a woman is the sole provider and family head, as when the husband is disabled or deceased. In those situations, the measure of damages will be ascertained by combining the elements of losses considered under this section and those set out in the subsequent section, death of a wife.

As was discussed in preceding sections, the surviving wife is entitled to receive the value of probable contributions the decedent might have made, the pecuniary value of services he might have rendered, lost inheritance, and, in some jurisdictions, compensation for lost companionship, the survivor's anguish, and reimbursement for medical and funeral expenses.

As was also pointed out earlier, both the life expectancy of the decedent and survivors must be determined to calculate lost contributions. The shorter of the life expectancies is used to reflect the maximum period for which pecuniary losses have been suffered.[100] Mortality tables may be used to assist the jury in determining life expectancy, but they are not conclusive.[101] Evidence of health and habits of the deceased may be used by the jury to compose a longer or shorter expectancy than the average set forth in the tables.[102]

The determination of lost contributions also entails reasoned speculation as to decedent's future potential as a wage earner, had he lived. His earning status immediately prior to death is certainly relevant, but the object of the evidence must be to determine potential earning capacity. It is the conjectured losses of contributions

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98 Comment, 20 NACCA L.J. 256, 257 (1957).

99 Martin v. Atlantic Coast Line R.R., 268 F.2d 397 (5th Cir. 1959); National Airline, Inc. v. Stiles, 268 F.2d 400 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959).

100 *See* Whitaker v. Blidberg Rothchild Co., 296 F.2d 554 (4th Cir. 1961); Montellier v. United States, 202 F. Supp. 384 (E.D.N.Y. 1962).

101 Steinbrunner v. Pittsburgh & W. R.R., 146 Pa. 504, 23 A. 239 (1892).

102 Noel v. United Aircraft Corp., 219 F. Supp. 556 (D. Del. 1963); Gordy v. Powell, 95 Ga. App. 822, 99 S.E.2d 313 (1957).

in the future which the award must reflect, and not simply multiplying present earnings by the number of years he was expected to live. Decedent's physical condition, work habits, education and opportunities for promotion should be considered.[103] If the decedent was a student or trainee, his performance in school is relevant. His chosen vocation itself must be studied to determine trends in pay and the requirements of the economy for personnel working in that specialty. In brief, decedent's life expectancy itself is not particularly meaningful unless and until supporting evidence is introduced to portray his potential as a wage earner. The use of expert testimony and assistance in this area is rapidly becoming imperative if counsel are to adequately represent their clients.[104]

In connection with earning capacity considerations, the courts should insist that counsel for beneficiaries delineate between the *life* expectancy and the *work* expectancy of the decedent.[105] If decedent was elderly, evidence that his capacity to earn was decreasing should be admitted and given appropriate weight.[106] This consideration becomes more important each year as labor unions make steady strides in decreasing mandatory retirement ages for wage earners. Should the court correctly insist on the differentiation, plaintiff's counsel should be permitted to introduce evidence of pension plans or other old age payment plans under which the decedent might have benefited.[107]

Children are usually included as beneficiaries under a wrongful death act and the general considerations governing awards for contributions, inheritance and companionship are equally appropriate. Life expectancy of children is usually not at issue, but the question of whether anticipated contributions from decedent should be calculated for only a child's minority period has been bothersome to the courts. Most courts refuse to arbitrarily decide that contributions from the decedent would have automatically ceased at major-

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103 Johns v. Baltimore & Ohio R.R., 143 F. Supp. 15 (W.D. Pa. 1956); Geary v. Metropolitan Street Ry., 73 App. Div. 441, 77 N.Y.S. 54 (1902).

104 Merrill v. United Air Lines, Inc., 177 F. Supp. 704 (S.D.N.Y. 1959). *See also* Eden, *For More Adequate Measurement of Impaired Earning Capacity and Medical Care Costs of the Injured, Trial and Tort Trends,* 62 BELLI SEMINAR, 257.

105 *See* Immel, *Actuarial Tables and Damage Awards,* 19 OHIO ST. L.J. 240 (1958); Krohl & Wolfe, *Work-Life Expectancy,* 26 INS. COUNS. J. 190 (1959).

106 *See generally* Eden, *The Use of Economists and Statisticians in Impaired Earning Capacity Cases,* 10 PRAC. LAWYER 23 (Mar. 1964). *See also* Missouri Pac. R.R. v. Gilbert, 206 Ark. 683, 178 S.W.2d 73 (1944).

107 *See* discussion in Kowtko v. Delaware & Hudson R.R., 131 F. Supp. 95 (M.D. Pa. 1955).

ity.[108] However, a few do apparently regard minority as the maximum period which may be considered.[109]

Loss of services is especially appropriate for consideration in determining damages to surviving children. The courts devote great care in attempting to determine at least the commercial value of services which have been lost by the death of the parent.[110] Estimated cost of replacement is again relevant in determining the worth of the nurture, training and guidance which the child has lost, but the evidence required to support the award is often less demanding than in some other damage areas.[111] Generally, however, successful litigants introduce evidence to show that the parent was not only qualified to give productive guidance,[112] but did in fact provide training, attention and devotion to the child's welfare.[113]

C. *Death of a Wife or Mother*

A 1959 edition of American Home magazine listed twenty-one major tasks that a housewife accomplishes each week.[114] The time devoted to these jobs averaged over seventeen hours per day,[115] and the survey concluded that the fair market value of these services approached 800 dollars a month.

Combine these figures with a prevailing belief that it is a hienous assault on family and society to take the life of a mother, and one can generously appreciate the stirring decisions which accompany wrongful death actions involving the death of a wife or mother: "Her price is far above rubies."[116] "[The] companionship, comfort, society, guidance, solace and protection which go into the vase of family happiness—are the things for which a wrongdoer must

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108 *See, e.g.*, Lund v. Seattle, 163 Wash. 254, 1 P.2d 301 (1931).

109 Baltimore & Ohio R.R. v. State *ex rel* Trainor, 33 Md. 542 (1871).

110 Michigan Cent. R.R. v. Vreeland, 227 U.S. 59 (1913); Montellier v. United States, 202 F.Supp. 384 (E.D.N.Y. 1962); Rogow v. United States, 173 F. Supp. 547 (S.D.N.Y. 1959); Prauss v. Adamski, 195 Ore. 1, 244 P.2d 598 (1952); Kramer v. Portland-Seattle Auto Freight, Inc., 43 Wash. 2d 386, 261 P.2d 692 (1953).

111 The award in Aronson v. Everett, 136 Wash. 312, 239 P. 1011 (1925) was apparently supported by nothing more than that most parents provide some worthwhile guidance to their children.

112 Norfolk & W. Ry. v. Holbrook, 235 U.S. 625 (1915).

113 Rogow v. United States, 173 F.Supp. 547 (S.D.N.Y. 1959).

114 AMERICAN HOME, Jan. 1959.

115 The hourly figure is somewhat misleading because hours were credited to each task separately, although a woman often accomplishes two or three chores at once, *e.g.*, baking, child care and dishwashing.

116 Dist. Judge Simpson in Legare v. United States, 195 F.Supp. 557, 561 (S.D. Fla. 1961).

pay when he shatters the vase."[117] "This companionship . . . is the necessity of life, as oxygen is to the air, to those who are treading the pathways of life in the later years of one's existence . . . ."[118]

If the above comments and excerpts were exaggerated, tongue in cheek commentaries on this portion of the law of wrongful death, they would serve no useful purpose on these pages. Understanding the valuation process in determining the worth of a wife or mother, however, requires some preliminary distillation of occasional syrupy pronouncements. The tortfeasor's counsel must prepare to counter the effect of tear-provoking jury pleas. The danger for a claimant's attorney is even more pronounced, however, if he is lulled into a dependency on sympathetic courts and juries. He will usually find that the opinions launch into verse-like rhetoric only when empirical evidence supports the amount awarded.

It is not unusual to find that the decedent housewife was also a wage earner on at least a part time basis. As pointed out in a previous section, if she did work outside of the home, evidence of the damages the beneficiaries have suffered by the loss of her earnings should be considered by the jury. The evidentiary requirements should be approximately the same as were described in that section, but may be complicated if the decedent worked outside of the home only sporadically. That is, she may have held a semi-permanent position but interrupted her career to bear and raise children. But, this is only to say that the evidence must be convincing enough to support an award for the lost earnings. The court should not reject consideration of these damages just because her work schedule was irregular over the years.

When a woman has not generally been a breadwinner but, rather, has devoted her energies to household tasks and care of her family, the most substantial portion of the damages awarded will be for the pecuniary value of her services to the beneficiaries. The valuation process consists of isolating the jobs the decedent performed in the household, determining the value of each by looking to the replacement market, and computing the combined total as damages. The use of expert testimony such as home economists and employment specialists is invaluable once it has been determined what work the decedent actually accomplished in the home.[119] These aids are practically meaningless, however, until the claimants pro-

117 Justice Musmanno in Spangler v. Helm's N.Y.-Pitts. Motor Express, 396 Pa. 482, 485, 153 A.2d 490, 492 (1959).

118 Chief Judge Gourley in Fabrizi v. Griffin, 162 F.Supp. 276, 279 (W.D. Pa. 1958).

119 *See* SPEISER, §§ 4:8 and 4:9 for sample testimony by such specialists.

vide proof of what and how *this* decedent performed. The award cannot be based upon what an ideal housewife should do, or how the average housewife accomplishes her work. Rather, the award must reflect the pecuniary damages that the beneficiaries have suffered by loss of this decedent's services. This warning was not considered necessary when considering the damages suffered by the loss of a husband and wage earner, but there is some tendency to assume that a decedent housewife performed all of the services she was supposed to perform.[120]

The age of decedent, her health and customary mode of performance are again pertinent considerations in the attempt to compute damages. These items were discussed in relation to the loss of a husband and father and will not be elaborated upon further. There is, however, another rather troublesome variable which is often considered in assessing damages upon the death of a woman. For want of a better description, it can be tentatively identified as the "quality of devotion" with which the decedent performed her work. The worth of this quality lies somewhere between the actual replacement value of her services and the "price of rubies." It is partially composed of what heretofore has been discussed as companionship and society. But it is something more, as may be gathered from the quotes at the beginning of this section. It is also an item which concerns the courts to an almost inordinate degree. It undoubtedly does so because the death of a mother creates an obvious loss, but a partially incalculable one.[121] The frugality of a wife is more meaningful than the efficiency of a replacement economist; aspirin dispensed with empathy by a mother may be a greater healant than the professional knowledge and sophisticated facilities available to a resident registered nurse. The problem, of course, is to assign a realistic value to this quality of devotion. As was seen in previous sections, the handling of inestimable losses has troubled the courts, and there is a definite split of authority as to their recognition and disposition. Those jurisdictions which attempt to evaluate the worth of companionship likewise award damages for the loss

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120 For example, in Prauss v. Adamski, 195 Ore. 1, 244 P.2d 598 (1952), the court apparently allowed the jury to determine damages based upon their own knowledge and judgment of what a housewife usually does. Even the well reasoned *Fabrizi* opinion, 162 F. Supp. 276 (W.D. Pa. 1958), is sprinkled with this vein of writing, but perhaps may be disregarded because the evidence supported the award and the utterances are only dicta.

121 *See, generally* Kierr, *Proof of Damages Arising From the Death of a Housewife,* 8 LA. BAR. J. 215 (1961).

of the security, guidance and devotion of a mother and wife.[122] Those which deny such recoveries similarly reject consideration of damages for the injuries realized by survivors by the loss of the mother's devotion.

A husband may also recover damages for the loss he has suffered if his decedent wife assisted him in his business or profession, as, for example, acting as a part time secretary.[123] As has been seen, the anguish of the husband and children is generally rejected as an item completely beyond valuation.

Other damage items discussed in previous sections such as funeral and medical expenses are equally relevant in this section and will often form a part of the wrongful death award.

D. *Death of a Child*

Traditionally, it has been more economical for a wrongdoer to kill an infant than an adult. If the administrator or executor is suing under a loss-to-estate type statute (survival-death act), the value of earnings the decedent might have accumulated during minority must be deducted as belonging to his father or other guardian.[124] His projected earnings minus expenses after minority may then be calculated, but the evidence becomes so speculative if an attorney is arguing about income ten or fifteen years hence that chances of a substantial recovery become nugatory.

The primary concern of this section, however, is loss-to-survivor statutes. Their interpretation, too, usually precludes recovery of substantial awards. As noted earlier, many jurisdictions have emulated both the words of Lord Campbell's Act and the first opinions interpreting it. This attitude has perpetuated the pre-eminence of the "pecuniary damages only" rule.[125] It has also stilted the judiciary because the courts use precedents established when children worked outside of the home from a very early age. At the turn of

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122 It may be guessed that it is the negligent killing of wives and mothers that has initiated the trend towards attempting to value companionship and society. For many years after *Vreeland,* there was little discussion of the worth of companionship in the cases. Then, as wives became more active outside of the home and drove automobiles regularly, the tragedy of their deaths became more vivid to the courts. The opinions began to speak in terms of loss of society along with valuing the worth of her more tangible services. It appears that only then did the courts and litigants renew their attempts at valuing the companionship upon the death of a man.

123 Alden v. Norwood Arena, Inc., 332 Mass. 267, 124 N.E.2d 505 (1955).

124 Carney v. Concord Street R.R., 72 N.H. 364, 57 A. 218 (1903). *See also* AM. JUR. 2d, *Death* § 147 (1965).

125 American R.R. v. Didricksen, 227 U.S. 145 (1913); da Silva v. J. M. Martinac Shipbuilding Corp., 153 Cal. App. 2d 397, 314 P.2d 598 (1957).

the century, a child could bring money into the home by working in a factory, or he provided valuable services in the then largely rural America by attending to farm chores. That age has largely passed for the majority of American children, but the formula for measuring damages to parents still remains: the value of probable services or contributions that the child would have rendered during minority minus the probable expenses to the parents of rearing.[126] As might be anticipated, if a court insists on a strict application of the pecuniary loss test, the award to surviving parents will be nominal.[127] The average child raised in an urban community would be required to devote most of his waking hours out of school to running errands, washing dishes and dusting furniture to match the expenditures his parents will make for his education, medical expenses, food and clothing. Nevertheless, a majority of jurisdictions purportedly still use the loss of services method of valuation.

If the child was very young, the award is based on little more than speculation by the jury.[128] As the child matures, however, evidence of his habits, health, conduct and intelligence become relevant considerations in determining the damages which the parents have sustained,[129] and the jury has somewhat more justification for making an award. Many jurisdictions hold that the jury may also consider that the decedent minor might have rendered contributions and services after reaching majority.[130] This application may not be criticized if the evidence warrants the award,[131] but may be condemned if the jurisdiction arbitrarily uses it as a device to avoid the harshness of the pecuniary loss rule — as for example, allowing the jury to speculate that an infant would have rendered services

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126 da Silva v. J. M. Martinac Shipbuilding Corp., 153 Cal. App. 2d 397, 314 P.2d 598 (1957); Brown v. Erie R.R., 87 N.J.L. 487, 91 A. 1023 (1914). For examples of more recent decisions, *see* Georgia S. & F. R.R. v. Perry, 326 F.2d 921 (5th Cir. 1964); interpreting Florida law; Montellier v. United States, 202 F.Supp. 384 (E.D.N.Y. 1962).

127 Scriven v. McDonald, 264 N.C. 727, 142 S.E.2d 585 (1965), found no pecuniary loss to parents whose retarded son had been killed and reversed the lower court's award of damages.

128 De Ruiz v. Jack Rudy Trucking Co., 171 Cal. App. 2d 609, 341 P.2d 388 (1959), awarded $15,000 to the mother of an 8-month old child.

129 J. Paul Smith Co. v. Tipton, 237 Ark. 486, 374 S.W.2d 176 (1964); Gluckauf v. Pine Lake Beach Club, Inc., 78 N.J. Super. 8, 187 A.2d 357 (1963).

130 *See, e.g.*, Bohrman v. Pennsylvania R.R., 23 N.J. Super. 399, 93 A.2d 190 (1952); Flory v. New York Cent. R.R., 170 Ohio St. 185 163 N.E.2d 902 (1959).

131 For example, there seems to have been adequate justification to award a $12,000 recovery to the family of a 22-year old girl who had been contributing weekly amounts to her family and paying some of their utility bills. Willman v. Jargon, 37 Ill. App. 2d 380, 185 N.E.2d 702 (1962).

after he reached majority. Those jurisdictions which hold that damages for loss of services after minority may never be considered because of the speculative elements are equally arbitrary and not justified if the evidence dictates other results.[132]

The states abide by their precedents established in death actions involving adults and generally prohibit awards based on the grief and anguish suffered by the surviving parents. There is also the same division of authority that was seen earlier concerning awards for the loss of society and companionship.[133] As noted previously, the apparent trend is to recognize and award damages for these latter losses which destroy the family relationship.

What was perhaps clumsily identified as the "quality of devotion" of a wife and mother's services discussed in the immediately preceding section carries the nomenclature of "filial care and attention"[134] when discussing the death of a child. Perhaps it can only be described as something other than the worth of tangible services, but more than companionship.[135] Whatever its name or characteristics, it is often recognized as an item for which compensation will be substituted.[136] As with companionship, some jurisdictions have even held that it is something to which a pecuniary value can be assigned. More probably, it is another tool to obviate the results which will attend if a jurisdiction must pay service to the pecuniary loss rule. This conclusion is suggested because it is the only plausible reasoning which supports the high awards which have been granted for the death of children in recent years.[137] Naturally, some jurisdictions deny the jury the opportunity to consider the loss of filial care, equating it with companionship and holding both too intangible to measure in dollars.[138]

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132 This writer has found no recent decisions which strictly apply this rule, dicta to the contrary notwithstanding. *See Annot.*, 14 A.L.R.2d 485 (1950).

133 Child cases: Tuffy v. Sioxus Transit Co., 69 S.D. 368, 10 N.W.2d 767 (1943) (denying recovery); Fuentes v. Tucker, 31 Cal.2d 1, 187 P.2d 752 (1947) (permitting recovery).

134 SPEISER § 4:19, at 330.

135 Hahn v. Moore, 127 Ind. App. 149, 133 N.E.2d 900 (1956), described it as the attention, kindness and faithfulness of the child to his family. Justice Smith in Wycko v. Gnodtke, 361 Mich. 331, 105 N.W.2d 118 (1960) described it as an integral element of family life, as necessary parts are to a machine.

136 Louisville, N.A. & C. R.R. v. Rush, 127 Ind. 545, 26 N.E. 1010 (1891).

137 Royal Crown Bottling Co. v. Bell, 100 Ga. App. 438, 111 S.E.2d 734 (1959) ($54,000 to a mother for the death of a 17 year old daughter); Heider v. Michigan Sugar Co., 375 Mich. 490, 134 N.W.2d 637 (1965) ($125,000 to parents of 8 year old son).

138 American R.R. v. Didrickson, 227 U.S. 145 (1913).

There has been a flurry of writing in the last decade challenging "bloodless bookkeeping imposed upon our juries"[139] which required the juries to confine their considerations of damages to the services minus cost of rearing formula.[140] The courts in several jurisdictions have responded to these pleas and the juries are awarding ever-increasing damages to beneficiaries upon the death of a child.[141] The methods used to accomplish the results are perhaps as varied as are the jurisdictions which have considered the question. The approaches, however, have in common the rejection of the services minus cost of rearing formula. The discarding is done either explicitly, or more subtly by the simple judicial device of approving large awards which are supported by only meager evidence. The substitute methods are each vulnerable because they lack substance when pierced by a probing examination. The two devices of valuing filial care[142] or arbitrarily allowing the jury to award damages for lost services after minority were mentioned previously. Neither can withstand logical scrutiny. A Georgia statute allows the surviving parent to be compensated for the loss of the child's services, but no deduction is required for the probable cost of rearing.[143] This same "measurement" was used by a federal court interpreting the Federal Tort Claims Act.[144] Its failure, of course, is that it does not measure at all, but simply chooses part of an established formula, but discards the calculations which would diminish the total. An older device that is still used is the presumption that the parents have suffered a pecuniary loss by the death, and thus no proof of the value of the services lost is required.[145] The celebrated case of *Wycko v. Gnodtke*[146] used a more sophisticated, and perhaps better reasoned, method. The Michigan court adopted a "lost investment" theory of damages whereby the wrongdoer was responsible to the parents for the expenses they had realized by paying for the child's birth, clothing, food, education and housing. The theory will

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139 Wycko v. Gnodtke, 361 Mich. 331, 342, 105 N.W.2d 118, 124 (1960).

140 *See* Spangenberg, *supra* note 75, § 3.3, at 63; Miller, *A Re-examination of the Measure of Damages for the Death of a Minor Child*, 15 DEF. L.J. 265 (1965).

141 *See* cases collected in 30 NACCA L.J. 188-199 (1964).

142 *See* the recent case of Lockhart v. Besel, 426 P.2d 605 (Wash. 1967) for a discussion of companionship and filial care.

143 GA. CODE ANN. § 105-1308 (1956).

144 Hoyt v. United States, 286 F.2d 356 (5th Cir. 1961).

145 *See, e.g.*, Black v. Michigan Cent. R.R., 146 Mich. 568, 109 N.W. 1052 (1906), although this thinking has been abandoned in favor of the "lost investment theory" set out in the above paragraph. *See also* Ihl v. Forty-Second Street & G. Street Ferry Ry., 47 N.Y. 317 (1872).

146 361 Mich. 331, 105 N.W.2d 118.

probably be widely emulated because it *sounds* reasonable, not to mention that the opinion is convincingly written. Nevertheless, the lost investment theory cannot escape the criticism that from whatever angle it is viewed, it amounts to no more than a recognition of the companionship and love that has been taken through death. Certainly the parents have invested heavily in the child's upbringing, but just as certainly their return on the investment if the child had lived would only be his love, kindness, devotion and services.

This writer's ambition is not to urge discarding of these approaches. On the contrary, they are serving the purpose of eliminating an outmoded measuring device and will hopefully spur the legislatures to study their wrongful death acts more closely. In the interim, these tentative measures may serve as stepping-stones in the attempt to find more accurate and fair valuation methods.

V. Punitive Damages, Limitations on Damages, the Collateral Source Rule and Taxes

There are four items yet to consider which did not fit into sections previously discussed, but which are important enough to deserve brief individual comment.

A. *Punitive Damages*

The Alabama and Massachusetts statutes state that only punitive damages may be awarded in a wrongful death action.[147] The amount awarded depends entirely upon the wrongdoer's culpability, and no regard is given to the pecuniary losses actually suffered by the survivors. Numerous commentators have directed scorching criticisms at this practice, concluding that there is no logic or justification in its application.[148] These punitive provisions were probably reactions to the civil immunity which protected a slayer prior to any wrongful death acts.[149] Nevertheless, it is a bold critic who states that there is no logic in the provisions. One need focus only momentarily on the confusion which prevails in wrongful death actions to conclude that a more accurate and efficient approach is urgently needed. Why not punitive damages, or even a form of "wergild" wherein the legislature would decide what a defendant should pay for taking a life? Every precaution is exercised to assure that a criminal defendant is punished to the same extent whether

147 Ala. Code tit. 7, § 123 (1958); Mass. Gen. L. Ann. ch. 229 § 2 (1955).

148 C. McCormick, Damages, § 103 at 357 (1935); Speiser, 71, § 3:3 at 71.

149 C. McCormick, *supra* note 148 at 357.

he has burglarized a worthless warehouse or the Chase Manhattan Bank. On the other hand, the emphasis in wrongful death cases, and tort law generally, is to insure that defendants are treated *differently* depending on who the victim was. Acknowledging that the purpose of tort law is different from that of criminal law does not decide the question. Present day claimants are realizing great strides in recovering damages, but it may be questioned whether defendants have been given the same considerations. Investigating this line of argument would entail a thorough and lengthy discussion which is not appropriate for this article. The thought of awarding a standard "man payment" or a form of punitive damages is simply suggested as an alternative to present methods, and one that should not be cast aside summarily.

Several other states allow awards of exemplary damages in addition to compensatory damages. Of these, some statutes explicitly state that they are recoverable,[150] while courts in other jurisdictions have interpreted the general language of their acts as allowing the jury to include such damages depending on the culpability of the defendant.[151]

B. *Limitations on Damages*

The Colorado and Rhode Island acts provide that damages awarded may not be less than 3,000 dollars and 5,000 dollars respectively.[152] The effect of these minimum limits is that a measure of punitive damages is always available to claimants if their proof fails to show other than nominal pecuniary losses.

The concern of commentators and plaintiffs in death cases, however, has been that almost one-quarter of the American jurisdictions provide maximum limitations on death damages.[153] Any justification for these limits is awkward to support if the state purports to be making a serious attempt at measuring pecuniary losses. The measuring process obviously crumbles when the damages reach the maximum amount allowable. Insurance lobbies should bear part of the responsibility for the fact that these limits still exist.[154] They were not, however, the source of encouragement which caused the original enactments, rather it was the distrust of juries that leg-

150 *See, e.g.,* COLO. REV. STAT. ANN. § 41-2-2 (1963); N.M. STATS. ANN. § 22-20-3 (1953).

151 *See, e.g.,* Boroughs v. Oliver, 226 Miss. 609, 85 So.2d 191 (1956).

152 COLO. REV. STAT. ANN. § 41-1-1 (1963); R.I. GEN. L. ANN. § 10-7-2 (1956).

153 SPEISER, § 7:2 and chart set out at 490.

154 *See* discussion in Comment, *Wrongful Death Limitations in Oregon—A Rational Result or Historical Mistake* 1 WILLIAMETTE L. REV. 616 (1961).

islatures so often display when they believe they have surrendered too much power and discretion. The most obvious absurdity is that these legislatures did not equivocate when they granted similar discretion to juries in personal injury actions. It is no more difficult for an effective trial lawyer to arouse sympathy in a personal injury case when he has a mangled living client than it is for him to generate similar passions for a death victim.

Several states have revoked the maximum limitations in the last three decades, and it is likely that other conservative jurisdictions will either raise their limits or abolish them completely in future years.[155]

C. *Collateral Source Rule*

The collateral source rule has generally been adhered to in most jurisdictions. That is, those which have adopted the rule hold that funds coming to a beneficiary from a collateral source do not mitigate the damages for which a defendant must pay. States which spurn the rule reason that a wrongful death award should be compensatory, and if the beneficiaries have received compensation for their losses from an outside source, recovery from the defendant would be an undesirable windfall. There is obviously some merit to the position of the critics, for a claimant may, in effect, receive a double recovery if a jurisdiction accepts the rule. For example, hospital bills may have been paid by Blue Cross Insurance, but most jurisdictions would insist that the defendant is still liable for the reasonable value of these expenses.[156] The continued support for the rule somewhat reflects an attitude that when given an innocent plaintiff, a wrongdoer and a knotty problem, "the interests of society are likely to be better served if the injured person is benefitted . . . ."[157] A loose translation of this kind of approach and language in the law often means that the difficulties involved in solving the problem, the confusion that might be wrought by a change in precedent, and the apparent balance of the conflicting views constrains the courts to favor the established method. The favored method here happens to be acceptance of the collateral source rule. This is not to say that the champions of the rule lack logic in their views. If an outside source has gratuitously conceded to support surviving beneficiaries, there is no reason to give a defendant the benefit of the dona-

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155 *Supra* note 153.

156 *See, e.g.*, Kopp v. Home Mut. Ins. Co., 6 Wis. 2d 53, 94 N.W.2d 224 (1959).

157 Hudson v. Lazarus, 217 F.2d 344, 346 (D.C. Cir.), *cert. denied*, 349 U.S. 968 (1954).

tion. If a decedent possessed sufficient foresight to purchase insurance, levying only the cost of the premiums on the tortfeasor would hardly be an adequate substitute. It will not usually be known what sacrifices, funds, energy and time were expended by the decedent in investigating the purchase, and what amount would compensate for these expenditures. If an employer grants continued wage payments to survivors upon an employee's death, it usually cannot be ascertained what benefits the decedent employee might have rejected with other prospective employers because of this post-death payment, or how many times he and his fellows had to "strike" the employer to gain this advantage.

This article will not further itemize and discuss the merits of the various arguments set forth by each side, for there is abundant expert material available in other writings. It is sufficient here to realize the existence of the rule and to note that the propriety of its application is often in question in death cases. Only two situations need be mentioned which are of particular interest in death cases. First, no reported case was discovered which diminished a survivor's recovery because of life insurance proceeds received. The majority also deny the wrongdoer mitigation of damages for medical insurance payments a beneficiary has received.[158] Second, a majority of jurisdictions hold that the remarriage of a surviving spouse will not benefit a tortfeasor, reasoning that damages are measured as of the date of death and what the survivor does subsequently is of no concern to the defendant.[159] The courts who accept the rule do not even allow evidence or mention of the remarriage to be used in court for fear that the survivor will be prejudiced in the estimation of the jury.[160]

D. *Federal Income Taxes*

There is no federal income tax liability levied on a wrongful death award,[161] and the problem presented is whether the jury should be instructed concerning this fact. Most jurisdictions hold that no instruction or argument may be presented to the jury which concerns any aspect of income taxes, and a trial court will suffer a reversal if the jury has received this "improper" instruction.[162] The

158 Stathos v. Lemich, 213 Cal. App. 2d 52, 28 Cal. Rptr. 462 (1963).

159 Saunders v. Schultz, 20 Ill. 2d 301, 170 N.E.2d 163 (1960).

160 Seaboard Air Line R.R. v. Connor, 261 F.2d 656 (4th Cir. 1958); Bunda v. Hardwick, 376 Mich. 640, 138 N.W.2d 305 (1965).

161 INT. REV. CODE of 1954, § 104(a)(2).

162 Wagner v. Illinois Cent. R.R., 7 Ill. App. 2d 445, 129 N.E.2d 771 (1955); Bergfeld v. New York, Chi. & St. L. R.R., 103 Ohio App. 87, 144 N.E.2d 483 (1956). A more complete list of jurisdictions is listed in Annot., 63 A.L.R.2d 1408 (1959).

stated justifications for failing to advise the jury of the non-taxability of the award are that it would confuse if not antagonize them.[103]

The issue of purportedly confusing the jury with an instruction can be handled summarily. In fact, the instruction could be as simple as advising of the non-taxability of the award and directing the jury to neither add to nor deduct from the computed recovery because of tax considerations.[164] The fact of confusion exists only in the thinking of the courts which have combined this simple situation with the more complex problem of whether evidence of income tax on decedent's future contributions should be considered.[165] This latter problem is admittedly difficult and will be discussed in subsequent paragraphs. It is important, however, to first understand that a tax *instruction* to the jury carries none of the difficulties inherent in the problem of evidence of taxes concerning lost contributions. It is unknown whether the jury correctly disregards tax considerations or incorrectly either adds to or deducts from the computed recovery because of their guesses about tax liability. This writer believes, however, that whatever the jury's reaction, it should not be left to chance that they correctly ignore tax considerations. Some commentators fear that an instruction about taxes would antagonize the jury so they would impose their own "tax" by reducing the award rather than allow the claimant to escape tax liability.[166] It is suggested by this writer that if a jury accepts only those instructions it likes and discards others, there is a radical deficiency in our system. It is doubtful whether any jury decision or award is near accurate if these triers of fact arbitrarily disregard evidence and instructions and substitute their own estimates.

The second and more difficult problem is whether the jury should receive evidence concerning prospective taxes on decedent's probable future earnings. Most jurisdictions apparently support the view that gross earnings should not be reduced because of taxes that would have been levied if the decedent had lived.[167] Only decedent's

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163 27 NACCA L.J. 302 (1963).

164 *See* sample instruction in Nordstrom, *Income Taxes & Personal Injury Awards,* 19 OHIO ST. L.J. 212, 235 (1958). *See also* Morris, *Should Juries in Personal Injury Cases be Instructed that Plaintiff's Recoveries are not Income within the Meaning of Federal Tax Law?* 3 DEF. L.J. 3 (1958).

165 *See* Dempsey v. Thompson, 363 Mo. 339, 346, 251 S.W.2d 42, 45 (1952) where the court obviously confused the two issues.

166 *Supra* note 163.

167 Bergfeld v. New York, Chi. & St. L. R.R., 103 Ohio App. 87, 144 N.E.2d 483 (1956); Girard Trust Corn Exchange Bank v. Philadelphia Transp. Co., 410 Pa. 530, 190 A.2d 293 (1963).

probable personal expenses are deducted from gross earnings to compute the award.

The proponents of the theory that recovery should be reduced by a sum equivalent to what would have been decedent's tax liability observe that fairness and accuracy demand the deduction.[168] They acknowledge that there are speculative elements inherent in the estimate such as the number of exemptions in the future and the basic tax rate itself. Nevertheless, they also recognize that the assurance of some taxes is certain,[169] and that a wrongful death award is based primarily on speculation in all of its aspects.

The arguments of the opponents (*i.e.*, opposed to evidence concerning taxes) are more varied, and though not always logical, they have been successful in blanketing opposition by sheer weight of numbers and repitition. A favorite argument is that the deduction would be too conjectural.[170] As noted throughout this paper, so is the very act of prophesizing that decedent would have earned any wages in the years to come. The majority of the courts also point out that the question of taxes, being a question of "status" of the parties, is a matter between the taxpayer and the government.[171] This point may be granted; however, it avoids the issue. One commentator has correctly noted that although *future* disposition of the award is a claimant's concern only, the process of *measuring* the size of the award is very much within the realm of the court.[172] The point has been made that if tax matters were allowed in evidence, the defendant might unfairly and arbitrarily benefit because the decedent was in the "upper bracket."[173] That defendant would realize these gains seems very fair to this writer in that the degree of his liability in damages is otherwise based almost wholly on decedent's "bracket;" *i.e.*, his earnings, future prospects, contributions and relative position in society. It therefore seems that any evidence affecting earnings would be pertinent, and not just that which favors the claimants.

The final resolution of this problem is undoubtedly several years away, and there are other ingenious arguments yet to be aired. The purpose of this section is not to suggest final disposition

168 2 F. HARPER & F. JAMES, TORTS, 1326 (1956). *See also* Cox v. Northwest Airlines, Inc., 379 F.2d 893 (7th Cir. 1967).

169 *Id.*

170 16 NACCA L.J. 211, 215 (1955).

171 *See, e.g.*, Mitchell v. Emblade, 80 Ariz. 398, 298 P.2d 1034 (1956); Hall v. Chicago & N.W. R.R., 5 Ill.2d 135, 125 N.E.2d 77 (1955).

172 Nordstrom, *supra* note 164 at 221-22.

173 Spangenberg, *Proof of Damages for Wrongful Death*, § 3.6 in WRONGFUL DEATH AND SURVIVORSHIP, (Beall, ed. 1958) at 88.

of the dispute. It should be noted, however, that an assault on the majority position is apparent in at least the federal courts. The march began as dictum in 1960[174] and has since earned several adherents which have used the dictum to substantiate reducing an award by deducting probable tax liability. The present status of the assailants is that "where the impact of income tax has a significant and substantial effect in the computation of probable future contributions . . . [it] may not be ignored."[175]

VI. Conclusion

It is most difficult to set forth a meaningful conclusion without again giving full textual treatment to each area with which this writer has previously dealt. Nevertheless, some broad summarizing may be attempted which will hopefully illuminate the many singular problems which cause confusion in the courts.

The most obvious lesson to be gained from this study is that both the patterns of statutes and judicial interpretation of these acts are often aimless and inaccurate. Few would demand that simply because our nation is a federated republic we should insist on civil laws that are consistent with one another in every state jurisdiction. The need for some uniformity, however, is refreshingly inviting after reviewing death cases from the many jurisdictions. Our dealings with the common law have taught that in most given factual situations, the courts will act in a fairly predictable fashion. The only certainty in statutorily based death cases, however, is that from jurisdiction to jurisdiction, the results of a litigated death action are entirely unpredictable. Even within the same jurisdiction, it is seldom known when a court will reject the pecuniary damages rule, throw out the traditional process of measuring damages for the loss of a child, or compose an instruction concerning the impact of taxes on a recovery. The statutes are often crude copies of Lord Campbell's Act and no apparent attempt has been made in most jurisdictions to synchronize the purposes of the acts with the needs of our more modern society. Children do not often hold factory positions today; nor do juries need to be arbitrarily limited by a statute which sets a maximum amount of damages for fear that the

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174 McWeeney v. New York, N.H. & Hartford R.R., 282 F.2d 34 (2d Cir. 1960), *cert. denied*, 364 U.S. 870 (1961); Montellier v. United States, 202 F.Supp. 384 (E.D.N.Y. 1962).

175 Cox v. Northwest Airlines, Inc., 379 F.2d 893, 896 (7th Cir. 1967). *See also In re* Marina Mercante Nicaraguense, S.A., 364 F.2d 118 (2d Cir. 1966); O'Connor v. United States, 269 F.2d 578 (2d Cir. 1959); Nollenberg v. United Air Lines, Inc., 216 F.Supp. 734 (S.D. Calif. 1963).

emotions of the jurors will dictate an excessive award. A very real vacuum is created by the death of a father or mother, but it is not substituted for by calculating that twenty-three minutes per day of moral guidance times three dollars per hour times life expectancy equals the child's loss. Parents do not set certain designated times aside to instruct and counsel. Rather, their actions, temperament, understanding and companionship nurture the child and assist his maturing.

The tenor of these conclusory remarks propels inescapably towards the need for a model death act. The difficulty of such a task may be indicated by the paucity of attempts at composing such an act. An effort was expended in this direction in 1942, but apparently never reached fruition.[176] Recommendations and articles since that time have been directed at specific shortcomings of certain judicial processes in death cases, or the failure of a particular state to provide adequate statutory or judicial administration. Although such discussions have merit within a limited realm, they cannot present a broad and logical answer to the myriad problems raised by adjudication of death cases. Only a concerted effort at uniform legislation can reach that result.

Charles Sherman Bloom

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176 *See* Oppenheim, *The Survival of Tort Acts and the Action for Wrongful Death*, 16 TULANE L. REV. 386 (1942).